

**OPEN RECORDS AND MEETINGS OPINION
2003-O-11**

DATE ISSUED: September 4, 2003

ISSUED TO: Rick Clayburgh, State Tax Commissioner

CITIZEN'S REQUEST FOR OPINION

On May 5, 2003, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Curly Haugland asking whether the State Tax Commissioner violated N.D.C.C. § 44-04-18 by not providing the names of 12 companies that have entered or propose to enter into agreements with the state of North Dakota under the Streamlined Sales Tax Project.

FACTS PRESENTED

On April 7, 2003, Mr. Haugland sent an e-mail to Mr. Clayburgh asking for the names of the 12 companies that have entered or propose to enter into agreements with the state of North Dakota under the Streamlined Sales Tax Project.

The project is described as follows:

The Streamlined Sales Tax Project is an effort created by state governments, with input from local governments and the private sector, to simplify and modernize sales and use tax collection and administration. The Project's proposals include tax law simplifications, more efficient administrative procedures, and emerging technologies to substantially reduce the burden of tax collection. The Project's proposals are focused on improving sales and use tax administration systems for both Main Street and remote sellers for all types of commerce.

Streamlined Sales Tax Project website, www.streamlinedsalestax.org, Executive Summary, March 2003. The Streamlined Sales Tax Project Resolution No. 06-03 states:

WHEREAS, one of the goals of the SSTP [Streamlined Sales Tax Project] is to encourage the registration and collection of sales and use taxes by remote sellers who are not now collecting such taxes on otherwise taxable sales to customers located in states where the remote sellers do not have physical presence sufficient to subject them to the states' jurisdiction to

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require such collection (*National Bellas Hess v. Dept of Revenue of Ill.*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)); and

WHEREAS, twelve companies (The Companies) with mail order and internet sales throughout the country and which support the goals and efforts of the SSTP have come forward and offered to register in states to begin collecting sales and use taxes in exchange for amnesty against tax, interest and penalty for periods before registration;

Streamlined Sales Tax Project, Resolution No. 06-03, adopted March 28, 2003. These 12 companies came forward anonymously, through an agent, and apparently want to retain their anonymity. As previously indicated, Mr. Haugland has asked the State Tax Commissioner for the names of any of these 12 companies that have entered or propose to enter into amnesty agreements with the state of North Dakota. Mr. Clayburgh responded to Mr. Haugland's request, indicating that N.D.C.C. § 57-39.2-23 prohibits the release of such information.

ISSUE

Whether the State Tax Commissioner violated the open records law by refusing to provide to the requester the names of any of the 12 companies that have entered or propose to enter into agreements with the state of North Dakota under the Streamlined Sales Tax Project.

ANALYSIS

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours." N.D.C.C. § 44-04-18. The North Dakota Office of Tax Commissioner is a public entity subject to the state's open records law. See N.D.C.C. § 44-04-17.1(12).

In regard to Mr. Haugland's opinion request, the State Tax Commissioner has notified our office as follows:

The North Dakota Office of State Tax Commissioner (Tax Department) has no knowledge of the existence or identity of ... [the] 12 companies [T]he Tax Department is aware that agreements from 7 companies relate to the Streamlined Sales Tax Project (SSTP). The Tax Department considers

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the identity of the 7 companies known to have submitted agreements that relate to the SSTP as confidential under N.D.C.C. § 57-39.2-23.

Letter from Rick Clayburgh (July 17, 2003).

When drafting open records and open meetings opinions, this office must base the opinion on the facts given by the public entity, N.D.C.C. § 44-04-21.1(1), in this case, the State Tax Department. Thus, I conclude that the Tax Department has no knowledge of the identities of the 12 companies which came forward anonymously and are referred to in the Streamlined Sales Tax Project Resolution No. 06-03. As such, he has not violated the open records law by refusing to provide the names of the 12 companies.

The Tax Department does, however, have agreements relating to the Streamlined Sales Tax Project with seven companies. The Tax Department believes N.D.C.C. § 57-39.2-23(1) specifically prohibits the release of any information regarding the identity of the seven companies. Subsection 1 states, in part:

The [tax] commissioner or a person having an administrative duty under this chapter [regarding sales taxes] may not divulge or make known in any manner whatever the business affairs, operations, or information obtained by an investigation of any person, corporation, or limited liability company in the discharge of official duty

N.D.C.C. § 57-39.2-23(1) (emphasis added). There are no Attorney General opinions or North Dakota court cases interpreting this provision, and the meaning of the language can be interpreted in more than one way. One interpretation is that it prohibits the Tax Commissioner from divulging the 1) business affairs, 2) operations, or 3) information, when any of these three things is obtained by an investigation of any person, corporation, or limited liability company. An alternative interpretation is that it prohibits the Tax Commissioner from divulging, in relation to any person, corporation, or limited liability company, the 1) business affairs, 2) operations, 3) or information obtained by an investigation. The second interpretation prohibits the Tax Commissioner from divulging more information than the first interpretation.

If a statute is ambiguous, extrinsic aids, including the legislative history and administrative construction of the statute, may be considered in determining the intent of the legislation. N.D.C.C. § 1-02-39; State v. Brossart, 565 N.W.2d 752 (N.D. 1997); Reed v. Hillsboro Public School District No. 9, 477 N.W.2d 237 (N.D. 1991). A review of the legislative history provides no assistance in determining the intended meaning of this provision in N.D.C.C. § 57-39.2-23(1).

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The Tax Department interprets the provision the second way described above. It has done so since at least 1967. It therefore interprets N.D.C.C. § 57-39.2-23(1) to prohibit it from disclosing the names of companies that have entered into agreements because disclosing the names would divulge “business affairs, [or] operations” of those companies.

The Department’s interpretation of a nontechnical statute is entitled to some deference if it does not contradict clear and unambiguous statutory language. North Dakota v. American West Community Promotions, Inc., 645 N.W.2d 196, 200 (N.D. 2002). An administrative agency’s interpretation of a statute is entitled to additional weight if the Legislature reenacts the statute after a contemporaneous or continuous construction of the statute by an administrative agency. Id. at 201. The Legislature has reenacted this section several times. See, e.g., 1969 N.D. Sess. Laws ch. 516, § 3; 1971 N.D. Sess. Laws ch. 536, § 5; 1973 N.D. Sess. Laws ch. 480, § 4.

It is my opinion that, given the long-standing interpretation of the Tax Department of the provision in this manner, it is reasonable for the Tax Department to interpret N.D.C.C. § 57-39.2-23(1) to prohibit the divulging, in relation to any person, corporation, or limited liability company, the 1) business affairs, 2) operations, 3) or information obtained by an investigation. The act of entering into an agreement to collect, report, and remit sales and use taxes in North Dakota constitutes the “business affairs” or “operations” of a person or entity, and the release of the names of the companies entering into such agreements, in my opinion, is prohibited by N.D.C.C. § 57-39.2-23.

CONCLUSION

It is my opinion that the State Tax Department did not violate the open records law by refusing to provide to the requester the names of the 12 companies that have entered or propose to enter into agreements with the state of North Dakota under the Streamlined Sales Tax Project.

Wayne Stenehjem
Attorney General

Assisted by: Lea Ann Schneider
Assistant Attorney General

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